No. 2264

United States
Circuit Court of Appeals
For the Ninth Circuit.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and FRANK H. JONES,

Trustees—Appellants,

vs.

COREY BROS. CONSTRUCTION COMPANY, a Corporation, and UNION PORTLAND CEMENT COMPANY, a Corporation,

Appellees.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

Reply Brief for Appellants.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

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CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and FRANK H. JONES, Trustees,

Appellants,

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Appellees.

Reply Brief for Appellants.

First.

Counsel for appellee makes the point that this Court is without jurisdiction to hear this appeal because the other defendants than the appellants (the Irrigation Company and the lien claimants) were not cited.

The decree in this case was not a joint one against all defendants. The Irrigation Company was decreed to pay money to complainant. As to the appellants, the decree merely found their lien was inferior to that of complainant and intervenor. A similar finding was made as to the other defendants. The decree not being joint, the presence of all defendants is not jurisdictional.

The most that can be said against considering the present appeal, is that there is a theoretical possibility that other defendants might appeal. That the

possibility is merely theoretical is obvious from the admitted insolvency of the Irrigation Company, the fact that it remained supine in the trial court, and that the other defendants did nothing further in that court than to show that they were lien claimants with suits pending in the Idaho courts to foreclose the same.

Under such circumstances this Court, we submit, should not dismiss the appeal, and thereby merely cause further delay and expense to the litigants, and further unnecessary work for the Court. See

Coler vs. Allen, 114 Fed. 609.

Winters vs. United States, 207 U. S. 564.

Brewster vs. Wakefield, 22 How. 118, 16 L. Ed. 301.

Gilfillon vs. McKee, 159 U. S. 303.

Moreover, no motion to dismiss this appeal has been filed pursuant to Rule 21 of this Court. Hence, the point (not being jurisdictional) is waived.

Appellant's time to appeal does not expire until June 23d. If, therefore, this Court should conclude to dismiss this appeal, we respectfully ask that it be done in time to permit us to perfect a new appeal.

Second.

Opposing counsel takes the view that the evidence shows that the dam's foundation is inadequate, and that such defect is due to faulty plans; and that hence the leaking of the superstructure, concededly due to Corey's departure from the contract, is immaterial. For the sake of the argument, admitting the premises to be true, this is to say that if the owner of a foundation contracts with a builder for the erec-

tion thereon of a substantial house, the builder may depart from the plain terms of the contract and thus produce an unsubstantial house, unfit to live in; and then enforce a lien upon the whole on the theory that there is a question about the stability of the foundation, and that hence a better house would not benefit the owner. This position is opposed not only to the authorities cited on pages 66 to 71 of our brief (and appellee has not even attempted to meet them), but also to the plain logic of the situation. The owner, having contracted for a substantial house, cannot be put off with less; but, on the contrary, is entitled to take his chances on the questionable foundation, or to strengthen it beyond question, whichever he may elect; thus having it in his discretion to make the whole structure absolutely safe, or leave uncertain the safety of a part.

In this case the evidence shows *without dispute* (see Storrow's testimony) that all question of the safety of the foundation of this dam could be removed by the digging and back-filling of a trench twenty feet deep at the upper toe of the dam. Must the Court say that the owner shall not (assuming that the defect in the foundation is the owner's fault) have the privilege of so securing the foundation, and thus acquiring a perfectly good dam, but that, having committed a curable fault in the foundation, it must for that reason pay for a *fatally* defective superstructure?

Appellee presents no excuse for this fatal defect in the superstructure except the *acquiescence* of the friendly Drummond, and his alleged authority to

"interpret" the contract, plans and specifications. It is elementary law that plain provisions do not require or permit of *interpretation.* This contract was not obscure in its provisions as to dumping from diagonal trestles.

If Drummond had authority to cause the rejection of work that was poor, or violated a specific provision of the contract, that did not bind the owner to accept such work if Drummond failed to reject it. This power to the engineer was merely an additional safeguard to the owner. (See United States vs. Walsh, 115 Fed. 701, and the other cases appearing in our brief, pages 62 to 65.)

Third.

Appellee says that the first answer filed on behalf of the bondholders' trustees did not specifically point out the faults in the work of complainant; that the first answer was like the answer of the Irrigation Company, and that these specific departures appeared in the amended answer filed one year later.

In answer we say, *first,* that paragraph 9 of the first answer specifically denied that complainant observed its contract in constructing the works; and, *second,* that by opposing counsel's own admission, this intervening year, during which this litigation lay quiescent was consumed in negotiations for a settlement which would permit the raising of money to rebuild and complete the dam. Pending such negotiations it is not strange that the interested parties refrained from unnecessarily making public record of the deplorable condition of this dam.

Appellee also claims that Rosecrans and Ralph

Arnold (both of the Arnold Co.) in 1910 admitted that Corey Bros.' work on this dam was well done. Not only do both Rosecranz and Ralph Arnold deny any such statements, but they also deny all personal knowledge, *Rosecranz not having seen the works for one year, and Arnold never having seen the works and not being an engineer.* (See affidavits of Rosecranz and Arnold, Rec. 148–149). If these two witnesses, having no conceivable interest so to do, falsely denied those alleged admissions, then it is a complete answer to counsel's inferences to say, *first,* that these men got whatever information they had from the subservient Drummond, and their misinformation would not have been surprising; and, *second,* that Trowbridge & Niver Co. had recently ceased business because of insolvency (see Wayman's testimony, p. 448 et seq.), and efforts were being made to refinance the system through other sources; and the claim is made that to aid this attempted refinancing, Ralph Arnold and Rosecranz, both of whom admittedly lacked all personal knowledge, denied the State's claim that Corey's work was bad. These alleged admissions of Rosecranz and Ralph Arnold were not asserted to impeach their testimony; they were in no position to make admissions for the Irrigation Company (Rosecranz had already left the Arnold Co.); the statements, if made, were not made under convincing circumstances; did not tend to impeach the witnesses, and as substantive proof of the sufficiency of the dam, or the compliance by Corey with his contract, they are, we submit, utterly without weight.

Fourth.

The carelessness of opposing counsel in handling the evidence led him, in his oral argument, into one error which we cannot properly omit to mention. He said that Rosecranz said, in speaking of the work of complainant on this system, "I have no fault to find." If this statement were accurate it would be significant indeed. The fact is, however, that this statement applied to the work that Rosecranz saw in progress *almost one year before the State stopped the work on the dam, and before this diagonal dumping was begun.* (Rec. 379.) And it apparently referred to work on the headgates of canals.

Fifth.

Appellee lays stress on the fact that Corey received an estimate *after* the State had stopped work upon the dam. The inference is drawn that this was in the nature of a final certificate. The record shows, however, that this was merely the usual monthly estimate for work done during that month—made in the usual course of business, and while the interested parties were trying to refinance after the failure of Trowbridge & Niver Co., so as to be in position to induce the State to permit the resumption of the work and the rebuilding of the dam. The issuance of that certificate has no legal significance (see authorities cited), and as evidence of compliance by Corey, the circumstances are such, we submit, as to give it no weight.

Sixth.

During the oral argument, appellee's counsel in words admitted that complainant has no lien on the

water contracts which are assigned to these appellants as security for the bonds.

Why, then, should the decree so read as to cloud our title to these contracts?

The bill of complaint asks that these contracts be sold. Complainant's counsel stated as frankly to the District Court as he had stated here, that although asking that relief he did not expect it. It therefore should not be necessary to argue that complainant is not entitled to it. Those $1,800,000 of water contracts (constituting mortgages upon the water rights acquired by the settlers from the Irrigation Company and upon the lands to be watered) are an asset in the hands of the trustees. The Court below, though requested, refused to so modify complainant's draft of decree as to show that this collateral in our hands was not to be sold, nor our rights therein affected; but preferred to leave that to future litigation. We submit that to leave to future litigation between one of these parties and the successor to the other, a question that can be settled now; and while clouding our title to this collateral, leaving the whole matter in such shape that a purchaser would frame his bid with reference to the certainty that he was purchasing a lawsuit, is unjustifiable from every standpoint. If our title to that collateral is not to be affected as asked in the bill, the decree should so state. If the *basis* of that collateral (viz., the title of the settlers) is to be affected, then those settlers should be made parties. If that basis is not to be

wiped out, the interest of the bondholders demands that the decree should so state.

Respectfully submitted,

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